

EXHIBIT 13  
DATE 3/6/15  
HB 427

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**THE PROPOSED COMPACT TAKES AWAY THE ON  
RESERVATION IRRIGATORS' PROPERTY RIGHTS IN  
THEIR WATER AND IRRIGATION DISTRICT.**



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## **THE PROPOSED COMPACT TAKES AWAY THE ON RESERVATION IRRIGATORS' PROPERTY RIGHTS IN THEIR WATER AND IRRIGATION DISTRICT.**

There are over 2000 irrigators who own fee simple lands with appurtenant water rights within the Flathead Irrigation District (FIIP), located within the exterior boundaries of the Flathead Indian Reservation. The Proposed Water Compact takes these water rights away from them and replaces them with lesser "Water Delivery Entitlement Certificates" that result in uncertain quantities of water from year to year and are subject to additional new rules yet to be promulgated by the United States Bureau of Indian Affairs.

The irrigators' property is not considered as reservation land. Under *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the U.S. Supreme Court, based on the Federal Power Act, found that "'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and *other* lands *owned by the United States*, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purpose; but shall not include national monuments or national parks."

This explains why the non-tribal governments of Montana are allowed to charge property taxes on the fee simple land owners on Montana's 7 Indian reservations.

The purpose of the reservation was to assimilate the Native Americans into the white society. For the Indians, the Hell Gate Treaty provided training and vocations:

“**ARTICLE V.** The United States further agree to establish at suitable points within said reservation within one year after the ratification hereof, and agriculture and industrial school, erecting the necessary building, keeping the same in repair, and providing it with furniture, books and stationary, to be located the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one black-smith shop; to which shall be attached a tin and gun shop; one carpenter’s shop; one wagon and ploughmaker’s shop; and to keep the same in repair, and furnish with the necessary tool. To employ two farmer, one blacksmith, one tanner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tool and fixtures, medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide the necessary establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.”

[*Treaty of Hellgate*, Article V - attached hereto]

For the non-Indians, likely for assimilative purposes, the Hell Gate Treaty provided allotments:

“Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not including in the reservation above named.”

[*Treaty of Hellgate*, Article II]

When the reservation was homesteaded under the allotment act as anticipated and provided for in the *Treaty of Hellgate* of 1855, and the 1908 Amendments to the Flathead Allotment Act, the non-Indian homesteaders (irrigators) received fee simple title to their property along with ownership of a water right that accompanied that property.

“In 1904, Congress passed a statute requiring the survey and allotment of lands within the Reservation. *See* 33 Stat. 902 *et seq.*

Through this Act, Congress directed allotments to be made to all persons with tribal rights on the Reservation and required the remaining lands on the Reservation to be opened to settlement and entry. *Id.* at 303-04. Congress further directed that one-half of the proceeds received from the sale of lands within the Reservation were to be expended by the Secretary:

for the benefit of the said Indians and such persons having tribal rights on the reservation . . . in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising[.]

*Id.* at 305. Thus the purpose of the Act was not only to provide for allotments to individual Indians and those with tribal rights on the Reservation, but also to open the remaining lands to settlement and to use a portion of the proceeds to provide agricultural assistance, including irrigation ditches, to the Indians of the Reservation.

“In 1908, Congress amended the 1904 Act to clarify the rights and responsibilities that were to be conveyed with settlement and entry and to modify how the proceeds from the sale of lands within the Reservation should be expended. *See* 35 Stat. 444, 448-50. The 1908 Act prioritized the construction of irrigation systems for all irrigable lands within the Reservation, regardless of Indian ownership, and removed the 1904 Act’s limitation on proceeds from “surplus” Reservation lands being used to construct irrigation structures solely for the benefit of the Indians of the Reservation. *See id.* Only after the use of proceeds to construct irrigation systems within the Reservation’s boundaries would the Secretary expend the remaining money “for the benefit of said Indians” to purchase cattle, farm implements, and other necessary articles. *Id.* at 450.

- - -

“Regardless of the percentage of unallotted lands that were held by non-Indian settlers at the time of the Act’s passage, one cannot ignore Congress’s clear intent to extend irrigation opportunities to all lands within the Reservation. Congress opened the Reservation for entry and settlement in 1904, and clarified in 1908 that these ‘surplus’ lands were also entitled to benefit from an irrigation system. Congress

instructed the buyers of Reservation lands to pay a proportionate cost for the construction of such system, and then directed the operation and management of the system to be transferred to the owners of the irrigated lands after construction costs were repaid. *See* 35 Stat. at 449-50. Even if Congress's original intent had been to authorize the construction of irrigation ditches for the benefit of reservation Indians, congress moved away from this intent in 1908 by directing the construction of an irrigation system to benefit *all* irrigable lands on the Reservation. - - -

- - -

"- - - The 1908 Act clearly states that operation and management of the Project shall be transferred to the owners of the irrigable lands serviced by the Project -- and implicit in this transfer is the termination of federal control over such operation and management. Once the Secretary approves rules and regulations to transfer these specific functions and the Project has been transferred to the owners of Project lands, the Project's functions will no longer be 'federal.' While the Department intends to oversee the transfer of the Project to ensure that future operation and management is consistent with the Secretary's rules and regulations, the operation and management of the Project will transfer to the Project land owners and will no longer have a federal imprimatur."

**[December 21, 2007 letter from Edith R. Blackwell, Deputy Associate Solicitor, Division of Indian Affairs, U.S. Department of Interior - attached hereto]**

The Compact removes their water rights from the irrigator members of the Flathead Irrigation Project (FIIP), transfers the bare legal title to the CSKT, and transfers a large portion of this water to in-stream flow.

**Flathead Indian Irrigation Project.** The Tribes have the right to water that is supplied to the Flathead Indian Irrigation Project to be used for such purposes in such volumes and flow rates and from such sources of supply as identified in the abstracts of water right attached hereto as Appendix 5. The FIIP will serve up to, but not more than 135,000 acres. The exercise of this portion of the Tribal Water Right

shall be satisfied by meeting the RDA (River Diversion Allowance) values for each RDA Area described in Appendix 3.2 as evaluated pursuant to Article IV.D.1.e, and is subject to Article IV.D through F.

The priority date for the portion of the Tribal Water Right used by the FIIP is July 16, 1855.

*Proposed Compact*, Article III, C.1.a.(pg 14)

The Compact removes the water rights of the irrigators who are not irrigating from the Flathead Irrigation Project (FIIP) and replaces these rights with "water delivery entitlement certificates" of a lesser amount.

"A Person who has both an entitlement to the delivery of water from the FIIP and a Water Right Arising Under State Law to serve the same acreage may only protect from Call, by entering into a consensual agreement pursuant to this Article III.G.3, a total quantity of water equal to the lesser of the annual FIIP quota for a given irrigation season, or an Alternate Value, for each acre served, irrespective of whether the water applied to each acre is pursuant to that Person's FIIP delivery right to that Person's Water Right Arising Under State Law."

[*Proposed Compact*, Article III.G.3, pg 32]

The irrigators right to use water under the Proposed Compact is subject to the dominion of the Bureau of Indian Affairs.

"Assessed land within the FIIP is entitled to have water delivered by the Project Operator **if the FIIP customer is in compliance with the applicable BIA rules and guidelines for FIIP**. Beginning on the Effective Date, an owner of assessed land within the FIIP may request of the Project Operator a delivery entitlement statement, which must be tendered within 90 days of the request or denied for cause. Beginning on the date one year after the Effective Date, the delivery entitlement statement must be tendered or denied within 30 days. **The delivery entitlement runs with the land and is valid so long as the land remains assessed and the FIIP customer is in compliance with the applicable BIA rules and guidelines for FIIP.**" [Emphasis added]

[*Proposed Compact*, Article IV, D2, pg 46]

If the Proposed Compact is ratified by the Montana Legislature, each of these more than 2000 irrigators will have the right to sue the State of Montana for the diminishment and wrongful taking of their property rights in their water. But be not concerned about the irrigators prevailing in the defense of their water rights after the Proposed Compact is ratified. Under Article VIII, D, they will have to beat the State of Montana, the Confederated Salish and Kootenai Tribes, and the United States government:

**D. Defense of the Compact.** The Parties agree to defend the Compact after its Effective Date from all challenges and attacks and in all proceedings pursuant to Article VII.B and C.

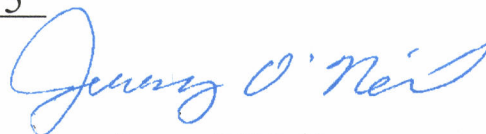
This brings to mind Judge C.B. McNeil's *Findings of Fact, Conclusions of Law and Writ of Mandate in Western Montana Water Users v. Mission Irrigation District, et al*, in which Judge McNeil found:

24. That - - said agreement contractually obligates the Defendant - - to defend the Tribes' claim before the Montana Water Court to all water rights on the reservation even though that is a direct conflict with individual water rights' claims of the irrigators before the Montana Water Court.

Findings of Fact, Conclusions of Law and Writ of Mandate in Western Montana Water Users v. Mission Irrigation District - attached hereto.

I urge you to follow the Hon. C.B. McNeil's lead and reject the Proposed Water Compact.

DATED: March 6, 2015



Jerry O'Neil

# **TREATY OF HELLGATE**

Treaty of July 16, 1855, 12 Stat. 975

Ratified March 8, 1859



Treaty of Hellgate  
July 16, 1855

**Treaty of Hellgate**  
**Treaty of July 16, 1855, 12 Stat. 975**  
**Ratified March 8, 1859.**

**JAMES BUCHANAN,**  
**PRESIDENT OF THE UNITED STATES OF AMERICA.**  
**TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME,**  
**GREETINGS:**

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year on thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead Nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognize Victor as said head chief.

**ARTICLE I.** The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork; thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115, degree) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene Rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the headwaters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

**ARTICLE II.** There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head of the Flathead tribe, as the head chief of the nation, the

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July 16, 1855

tract of land include within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the water flowing into the Bitter root River from those flowing into the Jocko to a point on Clarke's Fork between the Camas and Horse Prairies; thence northerly to, and along the divide bounding on the west Flathead River, to a point due west from the point half way in latitude between the northern and souther extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, and So-ni-el-em and the Jocko rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not including in the reservation above named. And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him until their value in money or improvements of an equal value shall be furnished him as aforesaid.

**ARTICLE III.** And provided, That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

**ARTICLE IV.** In consideration of the above cession, the United States agree to pay to

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the said Confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars in the following manner--that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

**ARTICLE V.** The United States further agree to establish at suitable points within said reservation within one year after the ratification hereof, and agriculture and industrial school, erecting the necessary building, keeping the same in repair, and providing it with furniture, books and stationary, to be located the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one black-smith shop; to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnish with the necessary tool. To employ two farmer, one blacksmith, one tanner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw- mill and one flouring-mill, keeping the same in repair and furnished with the necessary tool and fixtures, medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide the necessary establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses said to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to

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said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

**ARTICLE VI.** The President may from time to time, at his discretion, cause the whole, or said portion of such reservation as he may think proper, to be surveyed into lots, and assign the same as such individuals of families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

**ARTICLE VII.** The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

**ARTICLE VIII.** The aforesaid confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or is injured or destroyed, compensation may be made by the Government out of the annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

**ARTICLE IX.** The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportions of the annuities withheld from him or her for such time as the President may determine.

**ARTICLE X.** The United States further agree to guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain on the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupations of a trading post on the Pru-in River by the servants of that company.

**ARTICLE XI.** It is, moreover, provided that the Bitter Root Valley, above the Loo-lo Fork, shall be carefully surveyed and examined, and if it shall prove, in the judgement of the

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President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to the settlement until such examination is had and the decision of the President made known.

**ARTICLE XII.** This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs of the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, Governor and Superintendent Indian Affairs W.T. (L.S.)	
VICTOR, Head chief of the Flathead Nation,	his x mark.(L.S.)
ALEXANDER, Chief of the Upper Pend d'Oreilles	his x mark.(L.S.)
MICHELLE, Chief of the Kootenays,	his x mark.(L.S.)
AMBROSE,	his x mark.(L.S.)
PAH-SOH,	his x mark.(L.S.)
BEAR TRACK,	his x mark. (L.S.)
ADOLPHE,	his x mark. (L.S.)
THUNDER	his x mark. (L.S.)
BIG CANOE,	his x mark. (L.S.)
KOOTEL CHAH,	his x mark. (L.S.)
PAUL,	his x mark. (L.S.)
ANDREW,	his x mark. (L.S.)
MICHELLE,	his x mark. (L.S.)
BATTISTE,	his x mark. (L.S.)

KOOTENAYS

GUN FLINT,	his x mark. (L.S.)
LITTLE MICHELLE,	his x mark. (L.S.)
PAUL SEE,	his x mark. (L.S.)
MOSES,	his x mark. (L.S.)

James Doty, Secretary.  
R.H. Landsdale, Indian Agent.  
W.H. Tappan, Sub Indian Agent.  
Henry R. Crosire.  
Gustavus Sohon, Flathead Interpreter.  
A.J. Hoecken, Sp. Mis.  
William Craig.

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And, whereas, the said treaty having been submitted to the Senate of the United States for their constitutional action thereon, the Senate did, on the eighth day of March, eighteen hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

\*In Executive Session,

\*Senate of the United States, March 8, 1859.

**\*Resolved,** (two third of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and Chiefs, Headmen and Delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreille Indians, who are constituted a nation under the name of the Flathead Nation, signed 16th day of July, 1855.

\*Attest:

\*ASBURY DICKINS, Secretary.\*

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify and confirm the said treaty.

In testimony where of, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States, the eighty-third.

JAMES BUCHANAN.

By the President:

LEWIS CASS, Secretary of State



# United States Department of Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 21, 2007

James Steele, Jr., Chairman  
Confederated Salish and Kootenai Tribes  
P.O. Box 278  
Pablo, Montana 59855





# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

James Steele, Jr., Chairman  
Confederated Salish and Kootenai Tribes  
P.O. Box 278  
Pablo, Montana 59855

DEC 21 2007

Dear Chairman Steele:

I write in response to your August 17, 2007 letter (Letter), which requests the Department of the Interior's views on the applicability of the Indian Self-Determination and Education Assistance Act of 1975, (ISDEAA), codified at 25 U.S.C. § 450 *et seq.*, to the pending transfer of the operation and management of the Flathead Indian Irrigation Project (Project). Since 2002, the Department has consulted with the Confederated Salish and Kootenai Tribes (Tribes) and the Flathead Joint Board of Control (Board) regarding the necessary provisions and mechanism to transfer the Project's operation and management in an effort to facilitate a local solution.

Throughout this process, the Tribes have posited that a self-determination contract could serve as the appropriate mechanism for transfer. In February 2007, the Principal Deputy Assistant Secretary – Indian Affairs informed the Tribes and the Board that a self-determination contract would not work in this context. In July 2007, the Tribes requested an opportunity to present to the Department its legal views in favor of such a contract. Your August letter sets forth those views.

After further considering the Tribes' views and carefully reviewing the statutes and legislative history governing the establishment, construction and operation of the Project, I remain convinced that a self-determination contract does not provide an appropriate or viable mechanism to transfer the Project's operation and management. A detailed analysis of this position is set forth below.

## Background and Statutory History

The ISDEAA, known also as Public Law 93-638, authorizes the Secretary of the Interior (Secretary) to enter into self-determination contracts for specific types of government programs.<sup>1</sup> Most applicably, the Secretary may enter into self-determination contracts for programs "for the benefit of Indians because of their status as Indians[.]" 25 U.S.C. § 450f(a)(1)(E).

<sup>1</sup> The ISDEAA authorizes contracts for five categories of federal programs. See 25 U.S.C. § 450f(a)(1)(A)-(E). The first three categories, subsections A through C, refer to specific statutes under which tribes can apply for self-determination contracts. The final two categories, subsections D and E, set forth general requirements for such contracts.

In its letter, the Tribes contend that "because the [irrigation Project] was authorized by Congress 'for the benefit of said Indians,' it clearly falls into the category of "contractible programs 'for the benefit of Indians because of their status as Indians.'" Letter at 4. In determining whether the Project is in fact contractible under the ISDEAA, we must consider the history of the Flathead Indian Reservation (Reservation) and, more particularly, the specific statutes that authorized the construction and expansion of an irrigation system on the Reservation.

In 1904, Congress passed a statute requiring the survey and allotment of lands within the Reservation. See 33 Stat. 902 *et seq.* Through this Act, Congress directed allotments to be made to all persons with tribal rights on the Reservation and required the remaining lands on the Reservation to be opened to settlement and entry. *Id.* at 303-04. Congress further directed that one-half of the proceeds received from the sale of lands within the Reservation were to be expended by the Secretary:

for the benefit of the said Indians and such persons having tribal rights on the reservation ... in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising[.]

*Id.* at 305. Thus, the purpose of the Act was not only to provide for allotments to individual Indians and those with tribal rights on the Reservation, but also to open the remaining lands to settlement and to use a portion of the proceeds to provide agricultural assistance, including irrigation ditches, to the Indians of the Reservation.

In 1908, Congress amended the 1904 Act to clarify the rights and responsibilities that were to be conveyed with settlement and entry and to modify how the proceeds from the sale of lands within the Reservation should be expended. See 35 Stat. 444, 448-50. The 1908 Act prioritized the construction of irrigation systems for all irrigable lands within the Reservation, regardless of Indian ownership, and removed the 1904 Act's limitation on proceeds from "surplus" Reservation lands being used to construct irrigation structures solely for the benefit of the Indians of the Reservation. See *id.* Only after the use of proceeds to construct irrigation systems within the Reservation's boundaries would the Secretary expend the remaining money "for the benefit of said Indians" to purchase cattle, farm implements, and other necessary articles. *Id.* at 450.

#### Interpreting the 1904 and 1908 Acts

The Tribes' August 2007 letter focuses squarely on the language contained in the 1904 Act. In particular, the letter contends that the Project meets the requirements of the ISDEAA because the 1904 Act states that the proceeds from the sale of "surplus" lands shall be used to "benefit" Indians within the Reservation, including the construction of "irrigation ditches." Letter at 2, 4. The letter interprets this language as explicitly authorizing the construction of an irrigation system "for the benefit of Indians," and contend that the irrigation Project therefore falls within 25 U.S.C. section 450f(a)(1)(E) as a program "for the benefit of Indians because of their status as Indians." Letter at 4.

The cited language, however, must be read in light of the entirety of the 1904 Act, as well as the 1908 Act that amended it. The 1904 Act provided that half of the proceeds from the sale of "surplus" lands could be used to aid the Indians of the Reservation with agricultural endeavors, including the construction of irrigation ditches. In the Department's view, this language falls short of authorizing the construction of a full-fledged irrigation system "for the benefit of Indians because of their status as Indians." Authorization to construct an irrigation system did not come until 1908, when Congress explicitly directed the Secretary to reallocate the proceeds from the sale of "surplus" lands towards the construction of an irrigation system to benefit all irrigable lands within the Reservation, including those lands that passed out of Indian ownership.

Regardless of the percentage of unallotted lands that were held by non-Indian settlers at the time of the Act's passage, one cannot ignore Congress's clear intent to extend irrigation opportunities to all lands within the Reservation. Congress opened the Reservation for entry and settlement in 1904, and clarified in 1908 that these "surplus" lands were also entitled to benefit from an irrigation system. Congress instructed the buyers of Reservation lands to pay a proportionate cost for the construction of such system, and then directed the operation and management of the system to be transferred to the owners of the irrigated lands after construction costs were repaid. See 35 Stat. at 449-50. Even if Congress's original intent had been to authorize the construction of irrigation ditches for the benefit of Reservation Indians, Congress moved away from this intent in 1908 by directing the construction of an irrigation system to benefit *all* irrigable lands on the Reservation. Based on the express language of the 1908 Act, I cannot go so far as to conclude that the irrigation systems on the Reservation were intended to be operated in perpetuity "for the benefit of the Indians because of their status as Indians."

The 1908 Act presents an additional obstacle to transfer the Project via a self-determination contract. As discussed above, the 1908 amendment explicitly directed that "when the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works *shall pass to the owners of the lands to be irrigated thereby.*" 35 Stat. at 450 (emphasis added). It is the Department's longstanding view that the italicized phrase must be read in light of the current ownership of Reservation lands.

In other forums,<sup>2</sup> the Tribes have emphasized the composition of ownership that existed at the time of the 1904 and 1908 Acts in support of their position that the irrigation of non-Indian lands was to be a "minor part" of the Project and that most of the Project was to serve Indian allotments. The Department cannot ignore, however, the dramatic shift in ownership that has occurred since the 1904 Act authorized the settlement and entry of Reservation lands. Congress authorized the allotment of Reservation lands and the disposal of unallotted lands to non-Indian settlers. Congress also directed that all irrigable lands within the Reservation shall benefit from an irrigation

<sup>2</sup> See, e.g., "Summary of Testimony of the Confederated Salish and Kootenai Tribes of the Flathead Nation on Senate Bill 1186," April 1996.

system and that such system shall be transferred to the owners of those lands. Through the transfer provision of the 1908 Act, Congress created an explicit statutory right for all landowners served by the Project; i.e., after the repayment of the Project's construction costs, the operation and management of the Project must pass to the owners of the irrigable lands. This construct does not meet the requirements under ISDEAA.

**"For the Benefit of Indians Because of their Status as Indians"**

Our analysis is informed by the decisions of administrative and federal courts that have considered whether certain programs are operated "for the benefit of Indians because of their status as Indians." In *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9<sup>th</sup> Cir. 2005), the U.S. Court of Appeals upheld the Department's determination that the Trinity River restoration program was not eligible for a self-determination contract under 25 U.S.C. section 450f(a)(1)(E). The court affirmed the Department's administrative determination that the purpose behind ISDEAA is "to give Indian tribes more autonomy by enabling tribal governments to contract for 'programs or portions thereof' that the federal government creates or administers for the benefit of a tribe's lands, resources or members," and that Congress did not intend to authorize tribes to administer programs benefiting "the general public or non-Indian lands, resources or people."<sup>3</sup> The court concluded that the Trinity River restoration program was not "specifically targeted to Indians" but was instead intended to benefit a wide range of interests. 415 F.3d at 991.

*Hoopa Valley* relied on *Navajo Nation v. Dep't of Health & Human Services*, 325 F.3d 1133, 1138 (9<sup>th</sup> Cir. 2003) (en banc), which held that the Temporary Assistance for Needy Families Act (TANF) is also not a program "for the benefit of Indians because of their status as Indians." The *Navajo* court considered the five categories of programs delineated in the ISDEAA and determined that the plain language "underscores that programs or services that are 'for the benefit of Indians because of their status as Indians' must be federal programs specifically targeted to Indians and not merely programs that collaterally benefit Indians as a part of the broader population." *Id.* at 1138.

Finally, the Department considered the applicability of Public Law 93-638 to a Bureau of Land Management "hotshot" firefighting crew that fought fires on tribal and non-tribal lands. See *Tanana Chiefs Conference Inc. v. Acting Associate Alaska State Director, Bureau of Land Management*, 33 IBIA 51 (October 5, 1998). The tribal organization seeking the self-determination contract argued that the portion of the hotshot program that benefited tribal lands should be contractible under Public Law 93-638. *Id.* The Interior Board of Indian Appeals (IBIA) disagreed and concluded that the hotshot program was not operated "for the benefit of Indians because of their status as Indians." The IBIA noted that, because of the "unique, checkerboard pattern of land ownership" in Alaska, "the only logical conclusion is that Alaskan hotshot crews are operated for the benefit of all persons and valuable resources within the State[.]" *Id.*

<sup>3</sup> See *Hoopa Valley Tribe v. Northern Area Manager, Bureau of Reclamation*, Docket No. IBIA 00-41-A, 2001 I.D. LEXIS 140, \*22-23 (February 8, 2001).

Each of these cases conclude that programs that are contractible under 25 U.S.C. section 450f(a)(1)(E) must be programs that are specifically created and carried out for the purpose of benefiting Indians. Programs that mutually benefit both Indian and non-Indian interests, lands or resources, by contrast, are not contractible under that statutory provision. The Project at issue here was constructed and has been operated for the benefit of all irrigable lands on the Reservation, regardless of Indian ownership. It is not a program that has been "specifically targeted to Indians," but rather a program that benefits both Indian and non-Indian irrigators alike. The cases discussed above provide additional support for the Department's conclusion that the Project has not been operated "for the benefit of Indians because of their status as Indians" such that 25 U.S.C. section 450f(a)(1)(E) would apply to the Project's transfer as mandated by statute.

#### Absence of "Federal" Nature After Transfer

As the language of Public Law 93-638 makes clear, self-determination contracts can only be issued for programs and services conducted by the Federal government on behalf of Indian tribes. The 1908 Act clearly states that operation and management of the Project shall be transferred to the owners of the irrigable lands serviced by the Project -- and implicit in this transfer is the termination of federal control over such operation and management. Once the Secretary approves rules and regulations to transfer these specific functions and the Project has been transferred to the owners of Project lands, the Project's functions will no longer be "federal." While the Department intends to oversee the transfer of the Project to ensure that future operation and management is consistent with the Secretary's rules and regulations, the operation and management of the Project will transfer to the Project land owners and will no longer have a federal imprimatur.<sup>4</sup>

The intent of Congress to remove the operation and management of the Project from federal control is reinforced by the language of the 1908 Act. This Act states that, after the Project passes to the "owners of the lands irrigated thereby," the Project shall "be maintained at their expense[.]" 35 Stat. at 450 (emphasis added). Congress clearly intended that, after transfer, operation and management of the Project would no longer be funded or subsidized by federal funds. One of the primary objectives of Public Law 93-638 is to transfer federal programs and services to tribes and to ensure that Federal funds are provided to allow tribes to operate those programs and services. Allowing transfer of the Project's operation and management here through a self-determination contract would contradict Congress's directive that these specific functions be stripped of their federal status and maintained through non-federal funds.

#### Distinguishing Mission Valley Power

<sup>4</sup> The Tribes correctly note that the Department will retain ongoing responsibilities after transfer. In particular, the Department will continue to exercise its trust responsibilities over tribal trust resources, may incur specific responsibilities under the Endangered Species Act, and will retain ownership of the Project infrastructure. The existence of these responsibilities, however, does not alter the Department's view of the transfer requirements under the 1908 Act.

Your letter correctly notes that, in 1988, the Bureau of Indian Affairs issued a self-determination contract for the operation and management of the power distribution system now known as Mission Valley Power. Like the Project, this power distribution system serves both Indian and non-Indian customers. It is the Tribes' view that the ISDEAA should apply similarly to both of these federal programs. Letter at 5.

The history behind the construction and evolution of these two programs, however, is markedly different. Unlike the statutes authorizing the construction of irrigation works on the Reservation, the statutes that authorized the construction of the power distribution system created no rights for non-Indian landowners. Significantly, the statutes that authorized the power distribution system did not contain language requiring the benefits of the system to be extended to non-Indians on the reservation and did not require operation and management to be transferred to the affected landowners. See, e.g., 45 Stat. 200 (1928); 45 Stat. 1562 (1929); 62 Stat. 269 (1948). In the Department's view, these distinctions highlight why a self-determination contract may have been appropriate for Mission Valley Power but not for the transfer of the Project.

### Conclusion

The transfer provision of the 1908 Act has been triggered, and the Department is committed to facilitating the transfer of the operation and management of the Project to the owners of the lands irrigated thereby. Although the Department recognizes the potential advantages that could come from issuing the Tribes a self-determination contract for the operation and management of the Project, the ISDEAA cannot be read in a vacuum and must be considered in light of the language of the 1904 and 1908 Acts.

The 1904 legislation authorizing the construction of irrigation ditches for the benefit of Indians on the Reservation was subsequently amended to require the construction of an irrigation system that would benefit both Indian allottees and non-Indian purchasers of lands on the Reservation. Since its inception, the Project has been operated to benefit both Indian and non-Indian irrigators, and all of those irrigators contribute to the costs of operating and maintaining this system. Applying the standard set forth in *Navajo* and *Hoopa Valley*, the operation and management of the Project is not "specifically targeted" to the Tribes, but instead benefits both Indians and non-Indians alike.<sup>5</sup> Accordingly, we cannot conclude that the Project is "for the benefit of Indians because of their status as Indians" such that the Tribes would be entitled to a self-determination contract under the ISDEAA.

Assuming for the sake of argument that the Project may have been entitled to a self-determination contract prior to the repayment of construction costs, Congress directed the operation and management of the Project to be transferred to the owners of all lands irrigated by the Project, and intended that the federal imprimatur on these two functions be terminated. Public Law 93-638 only applies to programs or activities that are carried out by the federal government on behalf of Indian tribes, and a self-

<sup>5</sup> See *Hoopa Valley*, 415 F.3d at 990-92; *Navajo*, 325 F.3d at 1137-39.

determination contract cannot be issued for programs that are no longer "federal." Thus, Public Law 93-638 cannot provide the vehicle for transferring this Project.

The Department is committed to working diligently with the affected parties to develop the necessary mechanisms to transfer the Project that reflect the rights and interests of all parties and are satisfactory to the Secretary. I am informed that the Tribes have been meeting regularly with the Board and the BIA to develop contractual terms that could govern both the transfer and the future operation and management of the Project. I encourage you to continue on this path, and if I can provide any assistance in this process, please do not hesitate to contact me.

Sincerely,



Edith R. Blackwell  
Deputy Associate Solicitor  
Division of Indian Affairs

cc: Assistant Secretary - Indian Affairs  
Director, BIA  
FIIP Transfer Team Leader, BIA  
Joint Board of Control

1 Hon. C.B. McNeil  
2 District Judge  
3 Lake County Courthouse  
4 106 Fourth Avenue East  
5 Polson, MT 59860  
6 (406) 883-7250

CLERK OF  
DISTRICT COURT

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*W. J. McNeil*

8 **MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY**

9 WESTERN MONTANA WATER USERS  
10 ASSOCIATION, LLC, on behalf of its  
11 members, who own irrigated lands with  
12 appurtenant water and other water rights  
13 within the Mission, Jocko Valley, and  
14 Flathead Irrigation Districts,

13 Plaintiff,

14 vs.

15 MISSION IRRIGATION DISTRICT, JOCKO  
16 VALLEY IRRIGATION DISTRICT,  
17 FLATHEAD IRRIGATION DISTRICT, AND  
18 FLATHEAD JOINT BOARD OF CONTROL,

18 Defendants.

Cause No. DV-12-327

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND  
WRIT OF MANDATE**

20  
21 The above cause came before the Court February 14, 2013 pursuant to Mont. Code  
22 Ann. § 27-26-301 for a return and hearing upon the Alternate Writ of Mandate issued by this  
23 Court December 14, 2012;

24 Plaintiff appeared by its counsel, Brian C. Shuck and Bob Fain; Defendants appeared  
25 by their counsel Jon Metropoulos;

26 Good cause appearing therefore, the Court makes the following:



1 Hon. C.B. McNeil  
2 District Judge  
3 Lake County Courthouse  
4 106 Fourth Avenue East  
5 Polson, MT 59860  
6 (406) 883-7250

CLERK OF  
DISTRICT COURT

2013 FEB 15 PM 4:00

*W. J. Anderson*

8 **MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY**

9 WESTERN MONTANA WATER USERS  
10 ASSOCIATION, LLC, on behalf of its  
11 members, who own irrigated lands with  
12 appurtenant water and other water rights  
within the Mission, Jocko Valley, and  
Flathead Irrigation Districts,

13 Plaintiff,

14 vs.

15 MISSION IRRIGATION DISTRICT, JOCKO  
16 VALLEY IRRIGATION DISTRICT,  
17 FLATHEAD IRRIGATION DISTRICT, AND  
18 FLATHEAD JOINT BOARD OF CONTROL,

19 Defendants.

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**FINDINGS OF FACT,  
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24 Plaintiff appeared by its counsel, Brian C. Shuck and Bob Fain; Defendants appeared  
25 by their counsel Jon Metropoulos;

26 Good cause appearing therefore, the Court makes the following:

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FINDINGS OF FACT

1. That on December 12, 2012, Plaintiff filed a Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief.

2. That Mont. Code Ann., § 27-26-102 provides for a Writ of Mandamus to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust or station.

3. That Plaintiff's first claim for relief relies upon Mont. Code Ann., § 27-8-101, *et seq.*, the Uniform Declaratory Judgment Act and upon Mont. Code Ann., § 27-19-101 *et seq.* for injunctive relief.

4. That pursuant to Plaintiff's second claim for relief, Writ of Mandamus, this Court issued on December 14, 2012 an Alternate Writ of Mandamus commanding Defendants to comply with Mont. Code Ann., § 85-7-1956 and submit the final proposed Flathead Irrigation Project Agreement to a vote of the Irrigators and to first submit the proposed agreement to this Court, pursuant to Mont. Code Ann., § 85-7-1957 OR that Defendants file an Answer within 30 days of the Alternate Writ.

5. That Defendants did file an Answer January 16, 2013. That ¶ 15 of Defendants' Answer admits that approval of the FIP Agreement by the Flathead Joint Board of Control (hereinafter "FJBC") would be illegal for several reasons.

6. That Plaintiff is an LLC organized under the laws of the State of Montana and its members (hereinafter "Irrigators") all own fee simple lands with appurtenant water rights within the Defendants' Irrigation District and all are physically located within the exterior boundaries of the Flathead Indian Reservation.

7. The Defendants Mission, Jocko Valley and Flathead Irrigation Districts were all formed under the laws of the State of Montana for the purpose of providing effective public agencies for the improvement, development, operation, maintenance and administration of irrigation systems.

1 8. That the creation of said districts under Mont. Code Ann., § 85-7-101, *et seq.*  
2 expressly states that said law does not contemplate the acquisition by the districts of  
3 the existing water, water rights or systems or works owned by the Irrigators who are  
4 respective water rights owners within the districts.

5 9. That the Defendant Flathead Joint Board of Control was created under Montana  
6 Law under Mont. Code Ann., § 85-7-1601 *et seq.* when the Board of Commissioners of  
7 the three irrigation districts deemed it advisable for the best interest of their district to  
8 operate, manage, supervise and maintain the operation of their district jointly with  
9 other districts. That said FJBC has no ownership interest in any water rights.

10 10. That Article IX, Section 3 of the Montana Constitution recognizes and confirms all  
11 existing rights to the use of any waters for beneficial purposes, provides that all waters  
12 within the boundaries of the State are the property of the State subject to appropriation  
13 for beneficial uses as provided by law.

14 11. That Article II, Section 16 of the Montana Constitution provides that courts of  
15 justice shall be open to every person and speedy remedy afforded for every injury of  
16 person, property or character.

17 12. That Article II, Section 17 of the Montana Constitution provides that no person  
18 shall be deprived of life, liberty or property without due process of law.

19 13. That Article II, Section 29 prohibits the taking of private property without just  
20 compensation.

21 14. That Title 3, Chapter 7 of the Montana Code Annotated established water courts  
22 to adjudicate water rights in the State of Montana.

23 15. That Title 2, Chapter 15, Part 33 RCM established the Montana Department of  
24 Natural Resources and Title 85 Chapter 2, Mont. Code Ann., § 101, *et seq.* provided  
25 for the administration, control and regulation of water rights and established a system  
26 of centralized records of all water rights.

1 16. That Plaintiff has alleged that its members' fee lands would have less or little  
2 value without their water rights. This Court accepts as a truism requiring no further  
3 proof that irrigated fee lands with a water right are more valuable than irrigable fee  
4 lands with no water rights.

5 17. That the statutory procedure for dissolution of an irrigation district is Mont. Code  
6 Ann., § 85-7-1001, *et seq.* and requires a petition signed by an equal number of  
7 holders of title as were required to sign the original petition for creation of the district.

8 18. That in the draft agreement found on the 34<sup>th</sup> page of Exhibit "A" to Plaintiff's  
9 Complaint, numbered page 16, contractually provides that Plaintiff-Irrigators transfer or  
10 assign their water rights to the Salish and Kootenai Tribes of the Flathead Nation  
11 (Tribes) in order to join the Flathead Indian Irrigation Project (FIIP).

12 19. That the draft agreement contains no provision for any compensation to any  
13 individual irrigator for the transfer of his water rights to the Tribes.

14 20. That said draft agreement contains no contractual obligation on the part of the  
15 Tribes to issue any FIIP Tribes-owned water right to any of the Irrigators.

16 21. That ¶ 18, page 12 of said agreement sets a maximum quantum water right of 1.4  
17 acre feet per acre of water per year, which may be substantially less than the  
18 individual Irrigator's water right assigned to the Tribes, but there is no minimum  
19 requirement in the agreement for any "reallocated" water right to be provided to said  
20 Irrigators.

21 22. That said draft agreement is incomplete with ¶ 12, page 11 containing a  
22 highlighted phrase "review after completing compact language".

23 23. That the 16<sup>th</sup> through and including 33<sup>rd</sup> pages of Exhibit "A", each of which  
24 contain non-sequential numbers, contain an extensive list of rehabilitation and  
25 betterment improvement projects which will be owned by the Tribes, but said draft  
26 agreement at ¶ 26, page 14 contractually would require that this Montana District

1 Court designate the Irrigators' fee simple land as Irrigation District lands pursuant to  
2 Mont. Code Ann., § 85-7-107, which would subject said lands to tax assessments to  
3 pay for said projects without said lands having any water rights.

4 24. That ¶ 26, page 14 of said agreement contractually obligates the Defendant  
5 FJBC to defend the Tribes' claim before the Montana Water Court to all water rights on  
6 the reservation even though that is a direct conflict with individual water rights' claims  
7 of the Irrigators before the Montana Water Court.

8 25. That ¶ 78, the last page of said agreement, numbered page 26 on the 44<sup>th</sup> page  
9 of said draft agreement, contains a provision that the forum for disputes between the  
10 parties shall be federal court. Such a provision would be contractually binding upon  
11 the parties but would not be binding upon the U.S. District Court which has its own  
12 statutes and court rules for determining its jurisdiction. The two parties to the draft  
13 agreement who are not parties to this litigation, the United States and the Tribes,  
14 undoubtedly could invoke federal court jurisdiction because they are federally  
15 recognized legal entities. However, the third party to the agreement, the FJBC is not.

16 26. If the FJBC were to seek to invoke the jurisdiction of the U.S District Court for the  
17 resolution of a dispute arising under the agreement, the federal court could very well  
18 determine that the legal residency of the Tribes is Pablo, Montana within the Flathead  
19 Reservation; that all of the Irrigators' fee property is within the exterior boundaries of  
20 said reservation and therefore there is no diversity of citizenship and decline  
21 jurisdiction. Such a result would deprive Plaintiff of any legal forum for the resolution  
22 of any dispute arising under the agreement contrary to the State of Montana  
23 Constitution.

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1 Based upon the foregoing Findings of Fact, the Court makes the following:

2 CONCLUSIONS OF LAW

- 3 1. That Plaintiff's Petition and Complaint is based upon an Exhibit "A", Public  
4 Review Draft Agreement between the Confederated Salish and Kootenai Tribes of the  
5 Flathead Nation, the United States, acting through the Bureau of Indian Affairs of the  
6 the U.S. Department of Interior, and the Flathead Joint Board of Control of the  
7 Flathead, Mission and Jocko Valley Irrigation Districts.
- 8 2. That the Tribes and the United States are not parties to this litigation, and this  
9 Court has no jurisdiction over either.
- 10 3. That the Flathead Joint Board of Control and all the irrigation districts were all  
11 created under Montana law and are subject to the jurisdiction of this Court.
- 12 4. That the statutory purpose for which the three irrigation districts and the Flathead  
13 Joint Board of Control were created is to operate irrigation districts. That the irrigation  
14 districts and FJBC have no ownership interest in any water rights which are  
15 individually owned by the Irrigator members of the Districts. The statutes authorizing  
16 the creation of said districts and Joint Board of Control for such purpose are void of  
17 any authority for the FJBC to enter into any agreement which provides for the  
18 assignment of the water rights privately owned by the Irrigators to the Tribes.
- 19 5. That there also is a void of any authority for the FJBC to enter into an agreement  
20 which provides for the assignment of the Irrigators' water rights to the Tribes without  
21 just compensation for their valuable water rights in violation of the Montana  
22 Constitution.
- 23 6. That there also is no authority for the FJBC to enter into any agreement which  
24 provides for an assignment of the Irrigators' water rights to the Tribes as a pre-  
25 condition to becoming members of the FIIP when such agreement contains no  
26 contractual agreement by the Tribes to issue any water right to any Irrigator whether  
designated "reallocated right" or otherwise.

1 7. That there also is a void of any authority for the FJBC to enter into an agreement  
2 which provides for an agreement to a forum for disputes which deprives the Irrigators  
3 of their Montana Constitutional right to access to the state courts of justice, including  
4 the State District Courts, State Water Court and the Montana Supreme Court and  
5 further deprives the Irrigators of the protection of their water rights by the Constitution  
6 of the State of Montana.

7 8. That there also is no authority for the FJBC to enter into an agreement which  
8 provides that the Irrigators are contractually obligated to defend the Tribes' application  
9 to the Montana Water Court for all water rights on the reservation, which claim is in  
10 direct conflict with the Irrigators' own rights to apply to the Montana Water Court to  
11 have their water rights adjudicated by the Water Court under Montana law.

12 9. That there is also no authority for the FJBC to enter into an agreement requesting  
13 the Montana District Court to designate lands held in fee simple status as Irrigation  
14 District land. This would result in such lands being assessed and taxed to pay for the  
15 17 pages of projects set forth in the draft agreement and which projects would be  
16 owned by the Tribes and which fee lands would no longer have any appurtenant water  
17 rights.

18 10. That there also is no authority for the FJBC to effectively dissolve the FIP by  
19 providing for the assignment of the Irrigators' water rights to the Tribes in ¶ 30, page  
20 16 of said agreement and then applying to join the FIP without complying with the  
21 Montana statutory procedure for the dissolution of water districts.

22 That based upon the foregoing Findings of Fact and Conclusions of Law, the  
23 Court issues the following;

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1 as Exhibit "A" to Plaintiff's Complaint and for which specific conclusions of law are  
2 hereinabove set forth. Said conclusions may not be exhaustive and all inclusive, but  
3 each of which individually supports the issuance of a Writ of Mandate to enjoin  
4 Defendants from entering into the Draft Agreement or any other agreement with similar  
5 provisions.

6 DATED this 15<sup>th</sup> day of February, 2013.

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9 C. B. McNeil  
10 C.B. McNeil, District Judge  
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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the 15<sup>th</sup> day of February, 2013, I served a true and correct copy of the foregoing ***Findings of Fact, Conclusions of Law and WRIT OF MANDATE*** by U. S. Mail, first class, postage prepaid thereon, to the following:

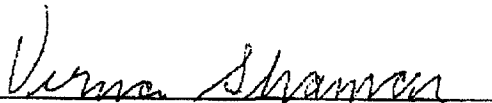
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Judicial Assistant